



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 6B**

**GERMANY**

This is the **summative (formal) assessment** for **Module 6B** on this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

**The mark awarded for this assessment will determine your final mark for Module 6B.** In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

## **INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

**Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.**

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentnumber.assessment5D]**. An example would be something along the following lines: 202021IFU-314.assessment5D. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentnumber” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **31 July 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 31 July 2021**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **6 pages**.

## **ANSWER ALL THE QUESTIONS**

### **QUESTION 1 (multiple-choice questions) [10 marks in total]**

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

#### **Question 1.1**

How are the competences of a preliminary insolvency practitioner defined?

- (a) By the debtor.
- (b) By the creditors' committee.
- (c) By statute.
- (d) By court decision.**

**correct**

#### **Question 1.2**

Which of the following securities has an accessory nature?

- (a) Suretyship.**
- (b) Transfer of title by way of security.
- (c) Mortgage (*Grundschild*).
- (d) Retention of title.

**correct**

#### **Question 1.3**

Creditors who wish to participate in the insolvency proceedings must file their claims with

- (a) The creditors' committee.
- (b) The creditors' meeting.
- (c) The insolvency practitioner.**
- (d) The court.

**correct**

#### Question 1.4

Who has the duty to file for insolvency proceedings?

(a) The directors of a Limited Liability Company (*GmbH*).

(b) All debtors.

(c) Legal persons only.

(d) Entrepreneurs only.

correct

#### Question 1.5

Wage claims of employees stemming from the period prior to the opening of insolvency proceedings

(a) Enjoy super-priority even ahead of secured creditors.

(b) Qualify as expenses of the proceedings (liabilities of the estate).

(c) Rank as claims of ordinary creditors.

(d) Cannot be recognized in insolvency proceedings at all.

correct

#### Question 1.6

Who of the following is entitled to submit an insolvency (restructuring) plan?

(a) Every creditor.

(b) The debtor.

(c) The court.

(d) The creditors' committee.

correct

#### Question 1.7

Which of the following circumstances **is not** relevant for the local jurisdiction of an insolvency court (*Amtsgericht*)?

(a) Registered office.

(b) Location of assets.

(c) Place of residence.

(d) Centre of economic activities.

correct

**Question 1.8**

The rights of which group **cannot** be affected by an insolvency plan?

- (a) Employees.
- (b) Shareholders.
- (c) Banks.
- (d) Creditors with a right to separation.**

correct

**Question 1.9**

How long is the compliance period (time frame) for discharge of residual debt?

- (a) Seven years.
- (b) Six years.
- (c) Three years.**
- (d) One year.

correct

**Question 1.10**

How are foreign insolvency proceedings recognised in Germany?

- (a) By decision of the court.
- (b) By the insolvency practitioner.
- (c) By statute (by force of law).**
- (d) By a decision of the creditors' meeting.

correct

**10 marks**

**QUESTION 2 (direct questions) [10 marks]**

**Question 2.1 [maximum 3 marks]**

Which rules regulate cross-border insolvency law in Germany (only list the norms)?

[Cross-border insolvency law is regulated by §§ 335 *et seq* of Insolvency Statute (Insolvenzordnung, InsO), §§ 3 and 4 InsO, §§ 12 *et seq* ZPO, EU Regulations 2015/848 (EIR), the principle of universality and the principle of *lex fori concursus*.]

Also by bi-/multinational agreements

2 marks

**Question 2.2 [maximum 4 marks]**

Explain the principle of publication in German law on security rights: which security rights are made public (and how) and which are not?

[The principle of publication requires that every transfer of property and every transfer, granting and release of a limited real right be made known to third parties. Where publication has not been made or is impossible to achieve, third parties are often protected against real rights the existence of which they did not know. That is why pledges on intangibles require notification on the third party (obligor) to become effective. The assignment by way of security in its legal effect is similar to the transfer by way of security: the creditor acquires the ownership of the claim but is bound by the security agreement as a fiduciary. Future claims against customers are not affected by the assignment before they are created, because a security right cannot exist without a security object. So, claims created after the opening of insolvency proceedings are not covered by the security right and claims created within the suspect period are subject to transaction avoidance.]

This is copied from the guidance text and cannot be accepted as a valid answer.

0 marks

Commented [DB1]: I have awarded half the marks, so 2/4.

**Question 2.3 [maximum 3 marks]**

What is and what happens at a "verification meeting" (*Prüfungstermin*)?

[Verification of the insolvency claims is a matter for the insolvency monitor. During the verification meeting the insolvency monitor enters every registered claim into a schedule for the court. All claims registered before the deadline are verified and are deemed to be determined only if no objection is raised by the insolvency administrator or by a creditor in the verification meeting. If a claim is disputed, then the court proceedings are initiated to determine whether to include it in the schedule or not.]

This is also copied from the guidance text.

0 marks

Commented [DB2]: I have awarded half the marks, so 1.5/3

in total: 2 marks

**QUESTION 3 (essay-type questions) [15 marks in total]**

Explain the rules in German insolvency law relating to executory contracts.

[In insolvency proceedings, executory contracts are also wound up. So, even after the opening of insolvency proceedings, the partner to the contract also has to fulfil their obligations under the contract. However, reciprocal contracts which are not yet fulfilled by either party are regulated differently. After the opening of proceedings, no winding up occurs (§ 103 InsO). Both parties only fulfil if the insolvency administrator chooses fulfilment. If this is the case, then the full claim must be satisfied from the insolvency estate. If the insolvency administrator rejects fulfilment of the claim, then the contracting partner can register a claim for equalization to the schedule which will then be satisfied on a pro rata basis. In case of contracts of continuing obligations, that remain unfulfilled by

either party, there are no application of specific provisions based in insolvency law, despite the existence of the right to choose fulfillment on the part of the insolvency administrator. The obligations need only be fulfilled in full as far as the assets were added to the estate after the opening of the insolvency proceedings.]

Again, copied from the guidance text.

0 marks

Commented [DB3]: This is too short for 15 marks and has been copied from the Guidance Text. I cannot help at all here.

#### QUESTION 4 (fact-based application-type question) [15 marks in total]

In January 2018, Bank (B) has granted debtor (D) a loan of EUR 50,000. Since B asked for security, D has transferred legal title over a lorry by way of security and has assigned all current and future receivables against her customers by way of security. Sixteen (16) months later, in May 2019, D is unable to pay her debts when they fall due. On 3 July 2019, B, being aware of D's substantive insolvency, terminates the loan contract and sells the lorry for EUR 20,000 to W. On 5 July 2019, B reveals the assignment to all customers of B and receives EUR 15,000 from X, who bought goods from D on 1 July 2019 and who pays B the money he owes to D. On 1 August 2019, D applies for insolvency proceedings. B receives another payment of EUR 10,000 from Y who bought goods from D on 10 September 2019. Five days later, the court opens insolvency proceedings and appoints I as insolvency administrator. I maintains B's business and sells goods to Z for EUR 5,000. Z is a regular customer of B, knows about the assignment and pays EUR 5,000 upon delivery to B. I claims EUR 50,000 from B, arguing that the sale of the lorry and the payments of X, Y and Z are subject to transaction avoidance (§§129 *et seq* InsO).

What are the various legal positions? Test this based on the norms.

[The Debtor has transferred legal title over a lorry by way of security, which has a non-accessory nature and made an assignment by way of security of all current and future receivables stemming from the debtor's business. As far as future claims against customers are concerned, such claims are not affected by the assignment before they are created as a security right cannot exist without a security object. As a result, claims created within the suspect period of three months prior to the application for insolvency proceedings are subject to transactions avoidance under §130 InsO. In that case, the contract has been celebrated in January 2018 and the Debtor applies for insolvency proceedings on 1 August 2019, so the suspect period started on 1 May 2019 and claims created after that are subject to transactions avoidance.

Security rights can be challenged by the insolvency practitioner under §§130, 131 InsO if they have been created within the relevant suspect period. As opposed to this, the mere realization of a security right is not voidable under transactions avoidance law, since it does not disadvantage the general body of lenders.

Transactions made before the opening of insolvency proceedings can be contested if they were made to the disadvantage of the creditors and a reason to contest has been shown. A transaction disadvantages the general body of creditors if it reduces the amount of proceeds that can be paid to the ordinary creditors.

The reasons to contest are listed in §§ 130 *et seq* InsO. In summary, assets can be returned to the insolvency estate if they left it in close timing to the opening of the insolvency proceedings or under circumstances which justify their return, even if the third party has already relied on their disposition.

In this case, there are the following reason to contest: A transaction granting or facilitating an insolvency creditor a security or satisfaction to which the contesting party had a claim

is contestable if it occurred in the last three months before the application to open insolvency proceedings occurred and when the debtor was already cash flow insolvent and the creditor was aware of this. On 3 July 2019, B, being aware of D's substantive insolvency and on 5 July 2019, B reveals the assignment to all customers of B. If there has already been an application to open insolvency proceedings, then the knowledge of such an application is sufficient grounds to contest. suspect period of three months prior to the application for insolvency proceedings must be decided by applying §140 InsO, which refers to the point in time where the transaction was perfected.]

Again, the text is massively copied from the guidance text and the solution does not sufficiently distinguish between the four transactions.

**0 marks**

**Commented [DB4]:** I cannot make any adjustment of the marks here.

**\* End of Assessment \***

**in total: 12 marks**

**Adjusted to 15.5/30 = 31%**